IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-682

SANTA CLARA PUEBLO, *et al.*,

Petitioners,

v.

JULIA MARTINEZ, *et al.*,

Respondents.

MOTION OF THE SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, AND THE NATIONAL CONGRESS OF AMERICAN INDIANS FOR LEAVE TO FILE BRIEF *AMICI CURIAE* and BRIEF *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The Shoshone Indian Tribe and the Arapahoe Indian Tribe, both of the Wind River Indian Reservation, Wyoming, and the National Congress of American Indians (NCAI) move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. The petitioner Santa Clara Pueblo has consented to the filing of this brief. The respondents have refused to consent.

The Tribes and NCAI file this motion because of the far-reaching impact of the decision below on the enrollment ordinances of almost every Indian tribe. The Court

is respectfully referred to the statement of the interest of *amici* appearing in the accompanying brief.

Respectfully submitted,

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INTEREST OF *AMICI*

The Shoshone Indian Tribe and the Arapahoe Indian Tribe are American Indian tribes with governing bodies recognized by the United States. The Tribes reside on the Wind River Indian Reservation, Wyoming. The Shoshone Tribe has 2216 members and the Arapahoe Tribe has 3111 members. Enrollment and inheritance practices in the Arapahoe Indian Tribe and the Shoshone Indian Tribe are unilineal but primarily follow the male line.

The National Congress of American Indians, Inc., (NCAI), is the oldest and most representative national organization devoted to the promotion, protection and preservation of the interests of American Indians. NCAI's

current membership includes most Indian tribes in the country and over 1500 individual members. Thus constituted, NCAI advocates positions supporting both tribal government and individual Indian people.

Membership in an Indian tribe is the equivalent of citizenship. For a tribe to ensure its existence as an Indian tribe, it must have the power to set standards for membership. Until the decision below, the exercise of this power was left to the tribes. Over the years, as circumstances and times have changed, tribes, of their own accord and by democratic process, from time to time have made changes in the requirements for enrollment. The decision below, however, would impose the external standards of the non-Indian society for the enrollment criteria of the tribes. The interest of *amici* is that enrollment in the tribes should be a decision for the tribes, not for the federal courts.

REASONS FOR GRANTING THE WRIT

1. **The case presents an issue of great importance to all Indian Tribes.** If the decision below stands, not only the Shoshone Indian Tribe and the Arapahoe Indian Tribe but all Indian tribes will be seriously affected. Membership in an Indian tribe represents the equivalent of citizenship. The right of a tribe to define its standards for citizenship is an indispensable prerequisite to self-preservation and integrity as a uniquely identifiable Indian nation. Indeed, no attribute of tribal sovereignty is more fundamental than the right of an Indian tribe to determine who its members shall be. See Cohen, Felix S., *Handbook of Federal Indian Law*, pp. 133-137 (GPO 1942).

Prior to the Indian Civil Rights Act of 1968, the law was settled that tribes have complete authority, as

political entities with attributes of sovereignty, to determine all questions of their own membership. E.g., *Cherokee Intermarriage Cases*, 203 U.S. 76, 95 (1906); *Roff v. Burney*, 168 U.S. 218 (1897); *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (C.A. 10, 1957), certiorari denied 356 U.S. 560 (1958). Where the question has arisen since the Indian Civil Rights Act, the courts have declined to interfere with tribal enrollment standards. *Baciarelli v. Morton*, 481 F.2d 610 (C.A. 9, 1973); *Slattery v. Arapahoe Tribal Council*, 453 F.2d 278 (C.A. 10, 1971). The case below is the only decision since the Indian Civil Rights ACt where a court has chosen to interfere with the ceiteria for tribal membership.

2. **The decision below creates uncertainty as to the applicable law and possible conflict among the circuits.** Thousands of tribal membership determinations are made each year. The decision below opens an avenue of federal litigation where tribes and their members will be exposed to uncertainty as to the validity of previously unchallenged tribal rolls. Tribal governing bodies will find themselves insecure in anticipating the standards that federal courts may find acceptable.

The Eighth and Ninth Circuits have evolved a suitable test for determining when tribal action would be reviewable under the equal protection clause of the Indian Civil Rights Act. Essentially, these courts have sustained tribal actions that deviate from the Anglo-American equal protection standard, if such actions are justified in terms of the tribes' interest in maintaining a separate and unique political and Indian society. *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233 (C.A. 9, 1976) (residency requirement for election to tribal office sustained); *Daly v. United States*, 483 F.2d 700, 705-06 (C.A. 8, 1973) (blood quantum requirements for tribal officeholders

upheld); *Woulded Head v. Oglala Sioux Tribal Council*, 507 F.2d 1079, 1083 (C.A. 9, 1975). *Cf. White Eagle v. One Feather*, 478 F.2d 1311, 1314 (C.A. 8, 1973) ("one-man, one-vote" principle applied to tribal election district apportionment).

The court below tested the Pueblo's membership ordinance by a different standard. It concluded the ordinance violated the Indian Civil Rights Act "because it draws its classification lines solely on the basis of sex" and "the facts do not support a decision that the tribe's interest is *compelling*." 540 F.2d at 1046, 1047 (emphasis added).

The "compelling interest" requirement imposed by the court below holds the Pueblo to a higher standard than that adopted by this Court in gender-based discrimination cases outside the Indian area. *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Reed v. Reed*, 404 U.S. 71 (1971).

The court below dismisses the Pueblo ordinance as "arbitrary and expedient", "inasmuch as it originates from practical economic considerations" (540 F.2d at 1048), and states:

> "The instant tribal policy is of relatively recent origin and so it does not merit the force that would be attributable to a venerable tradition."

Apparently, the court of appeals would accept enrollment criteria that discriminated on the basis of sex, if they were founded on ancient traditions instead of changed economic conditions.

Amici submit that in the case of the Pueblo there is clear historic justification for the policy of the ordinance. But even conceding the conclusion of the court below,

amici request the Court to take judicial notice of the changed situation of Indian tribes over the last 150 years. Up until the mid-1920's, most tribes were relatively immobile and isolated. Intermarriages outside the immediate tribal group were relatively infrequent,* and could be handled on an informal, *ad hoc* basis. With the advent of the automobile, the number of intermarriages outside the tribe increased dramatically. Confronted with the possibility of loss of identity, tribes adopted formal, selective enrollment ordinances to deal with this new problem.

Culture and policy are necessarily dynamic. To limit the scope of tribal self-determination to preservation of old procedures, without simultaneously permitting the tribe to adopt solutions to new problems forced upon them, is to unduly confine tribal self-determination. An arbitrarily static view of tribal culture would mandate assimilation of Indians as changing circumstances impinge upon their traditional communities. Such an approach flies in the face of established federal policy toward Indian tribes, (see *The American Indians—Message from the President of the United States*, 116 Cong. Rec. 23131-32 (1970)), and finds no support in the language or legislative history of the 1968 Act.

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* Indeed, to avoid congenital infirmities stemming from interbreeding, Indian tribes traditionally held fairs in the Spring of the year, attended by even hostile tribes, so that the young men and women could find mates from the outside.

CONCLUSION

For these reasons, *amici* urge the Court to grant the petition for certiorari and to consider the important questions of first impression that it presents.

Respectfully submitted,

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